

² The Board notes that appellant submitted additional evidence after OWCP rendered its May 6, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On December 3, 2015 appellant, then a 53-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) claiming that on November 29, 2015 he sustained injury due to a motor vehicle accident at work. He reported that he was jarred around in his cab when his tractor trailer was run into by a private motor vehicle. Appellant claimed that he sustained injuries to the right side of his neck, right shoulder, lower back, and right knee due to the November 29, 2015 motor vehicle accident. The employing establishment did not challenge or controvert the claim. Appellant did not stop work.

Appellant submitted a duty status report (Form CA-17) which described his physical work requirements, but the form was not fully completed or signed.

In a letter dated December 16, 2015, OWCP requested that appellant submit additional factual and medical evidence in support of his claim.

In a December 27, 2015 letter, a supervisor of transportation operations for the employing establishment indicated that on November 29, 2015 appellant was on the most direct route between the employing establishment and United Airlines when the motor vehicle accident occurred. She indicated that appellant was transporting official mail while driving an employing establishment tractor trailer. The supervisor of transportation operations included a copy of the Tinicum Township Police Department's Notification of Accident Investigation, dated November 29, 2015, and a copy of the employing establishment Accident Investigation worksheet, dated November 29, 2015.³

Appellant submitted December 2, 2015 emergency room records from Mercy Fitzgerald Hospital describing a November 29, 2015 injury and containing the diagnoses of cervicgia and muscle strain. The records were prepared by a person with the initials "PEF," but it is unclear if they were prepared or certified by a physician.

In a Form CA-17 dated December 4, 2015, Dr. Thomas J. Whalen, a Board-certified internist and osteopath, noted a November 29, 2015 date of injury, diagnosed sprain of neck and sprain of ligaments of lumbar spine, and recommended work restrictions. In an undated attending physicians report (Form CA-20), he diagnosed cervical and lumbar strain and sprain due to the November 29, 2015 work incident and indicated that appellant was totally disabled from December 3, 2015 to the present.

In a report dated January 13, 2016, Dr. Whalen reported the findings of his physical examination on that date, including moderately decreased motion of the extremities and the lumbar and thoracic spine. He provided a diagnosis of cervical strains and sprains, lumbar strain and sprains, right triceps strains and sprains, right knee contusion, disc protrusions at C2-3, C3-4, C4-5, and C5-6, and disc bulging at C6-7 and C7-T1. Dr. Whalen opined that appellant's diagnosed conditions were a "direct result of the trauma suffered on November 29, 2015." He found appellant to be totally disabled.

³ The record also includes an employing establishment Motor Vehicle Accident Report completed by appellant on December 2, 2015.

In a decision dated January 21, 2016, OWCP denied appellant's claim for a work-related injury on November 29, 2015 because he had not established an injury in the performance of duty on that date. It noted that the evidence was insufficient to establish that "the event(s) occurred as [appellant] described."

Appellant requested a review of the written record by an OWCP hearing representative, and submitted a January 26, 2016 statement in which he further described the factual circumstances of the November 29, 2015 incident.

Appellant also submitted a February 5, 2016 report in which Dr. Whalen noted that appellant had been treated "in this office for injuries sustained on November 29, 2015." Dr. Whalen indicated that appellant was working as the driver of a tractor trailer when a car made an illegal turn into him. He noted that a magnetic resonance imaging (MRI) scan was ordered and that this study demonstrated disc protrusions at C2-3, C3-4, C4-5 and C5-6. Dr. Whalen diagnosed cervical spine strain and sprain, thoracic spine strain and sprain, lumbar spine sprain and strain, right knee contusion, and cervical disc protusions at C2-3, C3-4, C4-5, and C5-6. He noted, "The prognosis on [appellant] remains guarded and it is with a reasonable degree of medical certainty that I state that these injuries are the direct result of the accident of November 29, 2015. [Appellant] remains totally disabled as the result of the accident of November 29, 2015."

In a March 11, 2016 report, Dr. Whalen noted that appellant was treated "in this office for injuries sustained on November 29, 2015." He indicated that appellant was driving a tractor trailer when he was involved in a motor vehicle accident which resulted in injuries to his neck and back. Dr. Whalen diagnosed cervical spine strain and sprain, thoracic spine strain and sprain, lumbar spine strain and sprain, right knee contusion, and disc protusions at C2-3, C3-4, C4-5, and C5-6. Dr. Whalen noted, "The prognosis on [appellant] remains guarded and it is with a reasonable degree of medical certainty that I state that these injuries are the direct result of the accident of November 29, 2015. [Appellant] remains totally disabled as a result of the accident of November 29, 2015."

In a March 2, 2016 letter, a supervisor of transportation operations for the employing establishment indicated that on November 29, 2015 appellant was performing his work duties when he was involved in a motor vehicle accident.

In a March 31, 2016 decision, OWCP's hearing representative reversed OWCP's January 21, 2016 decision denying appellant's claim for a work-related November 29, 2015 injury and accepted his claim for cervical strain, thoracic strain, lumbar strain, right knee contusion, and cervical disc protusions at C2-3, C3-4, C4-5, and C5-6. He noted that Dr. Whalen had produced a well-rationalized medical opinion in a report dated March 11, 2016. The hearing representative found that Dr. Whalen "displayed knowledge of [appellant's] job duties and diagnosed [his] cervical strain, thoracic strain, lumbar strain, cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6,] and right knee contusion conditions in relation to factors of his federal employment." He declared that the report "clearly establishes a causal relation between [appellant's] diagnosed conditions and factors of his employment as a tractor trailer operator

with the [employing establishment].” Regarding the rationale for his determination, the hearing representative noted:

“After a comprehensive review of the record, I find that [appellant] met his burden of proof in establishing that he sustained an injury in the time, place, and manner alleged. In addition, I find that [his] cervical strain, thoracic strain, lumbar strain, cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6,] and right knee contusion conditions are causally related to factors of his employment. Although [OWCP’s] decision of January 21, 2016 was properly issued, [appellant] has since submitted additional factual and medical evidence in support of his claim. After reviewing the evidence of record, I find that [OWCP’s] denial decision of January 21, 2016 should be reversed. Upon return of the case file, the [OWCP] should accept the claim for cervical strain, thoracic strain, lumbar strain, cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6,] and right knee contusion.”

Appellant submitted an April 1, 2016 report in which Dr. Bruce Grossinger, an attending Board-certified neurologist and osteopath, indicated that he obtained electrodiagnostic testing on the date.⁴ Dr. Grossinger noted that the testing showed that appellant had a moderate right C5 radiculopathy, which was expressed as moderate denervation in multiple right C5 myotomes and related paraspinous regions relating to a herniated disc at C4-5.⁵ He noted, “[Appellant’s] work injury gave rise to his condition.” In form reports dated April 8, 2016, Dr. Whalen diagnosed cervical, thoracic, and lumbar strains and sprains.

In a May 6, 2016 decision, OWCP’s hearing representative amended his March 31, 2016 to reflect that the case remained accepted for the conditions of cervical strain, thoracic strain, lumbar strain, and right knee contusion, but that it was no longer accepted for disc protrusions at C2-3, C3-4, C4-5, and C5-6. In making this determination, he effectively rescinded his prior acceptance of appellant’s claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6. The hearing representative noted:

“Upon further review, it was determined that the record did not include documentation establishing that the claim should be accepted for disc protusions at [C2-3, C3-4, C4-5, and C5-6]. Specifically, the medical evidence of file was insufficient to support the accepted conditions of cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6]. The reason for this finding is that the medical evidence of file lacked a definitive medical report with diagnostic tests which unequivocally supported the diagnosed conditions of cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6].

“In the instant case, the decision dated March 31, 2016 indicated that the claim should be accepted for cervical strain, thoracic strain, lumbar strain, right knee

⁴ Electromyogram and nerve conduction velocity testing results of the upper extremities, obtained on April 1, 2016, were also submitted.

⁵ The record does not contain any diagnostic testing supporting a finding of a C4-5 disc herniation.

contusion and cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6]. A careful review was undertaken for each of the identified accepted conditions. This review established that the medical evidence submitted, when reviewed comprehensively, did support the accepted conditions of cervical strain, thoracic strain, lumbar strain and right knee contusion. However, the medical evidence submitted, when reviewed comprehensively, did not support the accepted conditions of cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6]. [Appellant] has not established that his claim should be expanded to include the conditions of cervical disc protusions at [C2-3, C3-4, C4-5, and C5-6].”⁶

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁷ The Board has upheld OWCP’s authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁸ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁹

Workers’ compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation employing establishment and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹⁰

ANALYSIS

Appellant filed a claim alleging that he sustained multiple injuries due to a vehicular accident at work on November 29, 2015. In a decision dated January 21, 2016, OWCP denied his claim for a work-related injury on November 29, 2015 because he had not established an injury in the performance of duty. In a March 31, 2016 decision, an OWCP hearing representative reversed OWCP’s January 21, 2016 decision denying appellant’s claim for a work-related November 29, 2015 injury and accepted his claim for cervical strain, thoracic

⁶ In a May 17, 2016 decision, OWCP indicated that appellant’s claim had been accepted for strain of muscle, fascia, and tendon at neck level, strain of muscle and tendon of back wall of thorax, strain of muscle, fascia, and tendon of lower back, and contusion of right knee. Appellant has not received any disability compensation from OWCP.

⁷ 5 U.S.C. § 8128.

⁸ *John W. Graves*, 52 ECAB 160, 161 (2000).

⁹ *See* 20 C.F.R. § 10.610.

¹⁰ *Supra* note 8.

strain, lumbar strain, right knee contusion, and disc protrusions at C2-3, C3-4, C4-5, and C5-6. He noted that Dr. Whalen produced a well-rationalized medical opinion in a report dated March 11, 2016.¹¹ In a May 6, 2016 decision, the hearing representative amended his March 31, 2016 to reflect that the case remained accepted for the conditions of cervical strain, thoracic strain, lumbar strain, and right knee contusion, but that it was no longer accepted for disc protrusions at C2-3, C3-4, C4-5, and C5-6. In making this determination, he effectively rescinded his prior acceptance of appellant's claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6.

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6.

The Board notes that, in his May 6, 2016 decision, OWCP's hearing representative provided adequate explanation and support for his rescission action. He acknowledged that Dr. Whalen diagnosed disc protrusions at C2-3, C3-4, C4-5, and C5-6. This diagnosis is contained in Dr. Whalen's reports dated February 5 and March 11, 2016. However, the hearing representative explained that there was no support for this diagnosis as there were no diagnostic testing reports in the record showing disc protrusions at C2-3, C3-4, C4-5, and C5-6. In his February 5, 2016 report, Dr. Whalen noted that an MRI scan was ordered and this study demonstrated disc protrusions at C2-3, C3-4, C4-5 and C5-6. However, he did not attach any report of such testing and such a report was not in the record at the time of the May 6, 2016 decision of the hearing representative. The hearing representative noted in his May 6, 2016 decision, "The medical evidence of file was insufficient to support the accepted conditions of cervical disc protrusions at [C2-3, C3-4, C4-5, and C5-6]. The reason for this finding is that the medical evidence of file lacked a definitive medical report with diagnostic tests which unequivocally supported the diagnosed conditions of cervical disc protrusions at [C2-3, C3-4, C4-5, and C5-6]."

The Board finds that the rescission of the acceptance of appellant's claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6 was appropriate and adequately explained by OWCP as the record lacked adequate medical evidence supporting the acceptance of these conditions at the time of the May 6, 2016 decision of the hearing representative.¹²

On appeal appellant alleged that diagnostic testing reports showed disc protrusions at C2-3, C3-4, C4-5, and C5-6. However, as previously noted, no such reports were in the record at the time of the May 6, 2016 decision of the hearing representative.

For these reasons, OWCP met its burden of proof to rescind its acceptance of appellant's claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6.

¹¹ The hearing representative accepted that the November 29, 2015 accident occurred as claimed by appellant and that it constituted an established work incident.

¹² Dr. Whalen was the only physician of record who addressed the matter of cervical disc herniations in the context of the November 29, 2015 work injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for disc protrusions at C2-3, C3-4, C4-5, and C5-6.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board